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SUPREME COURT, U.S.

CASE NO. A-814

81-6813

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1981

WILLIAM DUANE ELLEDGE,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
SUPREME COURT OF FLORIDA

BRIEF OF RESPONDENT
STATE OF FLORIDA

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES.....i

OPINION BELOW.....1

JURISDICTION.....1

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED.....1

ARGUMENT.....2

1. Whether the Supreme Court of Florida Erred in Holding That the Substantial Rights of Petitioner Were not Violated by his Being Shackled While Being Presented for a Resentencing.....3,4

2. Whether the Consideration of of Mitigating Circumstances was Precluded by the Operation of Law.....4-6

3. Whether Double Jeopardy Attaches to Prevent Certain Aggravating Circumstances to be Found After, on Direct Appeal, the Previous Sentencing Proceedings are Found Infirm.....6-8

4. Whether the Jury was Precluded from Hearing Evidence Concerning the Applicability of the Death Penalty.....8,9

5. Whether the Rule Announced by the Florida Supreme Court in Elledge v. State, 346 So.2d 998 (Fla. 1977), Announces a "Automatic Harmless Error Rule".....9-12

CONCLUSION.....12

CERTIFICATE OF SERVICE.....12

TABLE OF AUTHORITIES

Page

Brown v. State,
381 So.2d 690 (Fla. 1980).....10

Bullington v. Missouri,
___U.S.___, 68 L.Ed.2d 270 (1981).....1,6,7,8

Elledge v. State,
346 So.2d 998 (Fla. 1977).....9,10

Engle v. Isaac,
___ U.S.___(1982), 31 CrL 3001.....11

Estelle v. Williams,
415 U.S. 501 (1976).....2,4

Furman v. Georgia,
408 U.S. 238 (1972).....10

Henry v. Wainwright,
661 F.2d 56 (5th Cir. 1981).....11

Lockett v. Ohio,
438 U.S. 506 (1978).....5, 9

Proffitt v. Florida,
428 U.S. 242 (1976).....5, 6

Spinkelink v. Wainwright,
578 F.2d 582 (5th Cir. 1978).....5,6

Stephens v. Zant,
631 F.2d 397 (5th Cir. 1980).....11

Washington v. Watkins,
655 F.2d 1346 (5th Cir. 1981).....4

Zant v. Stephens,
___ U.S. ___, 50 U.S.L.W. 4472 (May 3, 1982).....11

FLORIDA STATUTES

§ 921.141, F.S.....5

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BRIEF FOR RESPONDENT IN OPPOSITION

OPINION BELOW

The opinion of the Supreme Court of Florida is reported at 408 So.2d 1021 (Fla. 1982).

JURISDICTION

Respondent concedes that petitioner's statement of jurisdiction is correct.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Respondent agrees that the issues presented by petitioner present allegations that his Fifth, Sixth, Eighth, and Fourth Amendment rights have been violated. Additionally, petitioner asserts a violation of his right to be free from being twice placed in jeopardy under the principle of Bullington v. Missouri, ____U.S.____, 68 L.Ed.2d 270 (1981).

ARGUMENT

1. Whether the Supreme Court of Florida Erred in Holding That the Substantial Rights of Petitioner Were not Violated by his Being Shackled While Being Presented for a Resentencing.

Petitioner herein has cited Estelle v. Williams, 425 U.S. 501 (1976), and has urged this Court to find that the Supreme Court of Florida has rendered an opinion which misapplies that decision. This Court held in Estelle v. Williams that an accused is entitled to the presumption of innocence during the trial and the presentation to the jury of a defendant clothed in prison attire, allows "...the possible impairment of the presumption so basic to the adversary system." Estelle v. Williams, supra, at 504.

Such is not the case presented here for several reasons. First, the petitioner is not entitled to a presumption of innocence. He has undeniably been found guilty of a capital offense. The jury has concluded, beyond a reasonable doubt, that the defendant committed the crime for which he was charged. It is elemental that the jury no longer views him as an innocent man. In Estelle v. Williams, this Court mentions the fact that under certain circumstances there would be no detriment in trying defendant in prison garb. Such would be the case if the offense was committed while defendant was in prison. The jury early is faced with evidence placing defendant in prison when the offense occurred. The Court stated: "No prejudice can result from seeing that which is already known." (Citation omitted), at p. 507.

Petitioner has stated that the Florida Supreme Court has misread Estelle v. Williams. Specifically, the claim is that petitioner is entitled to a fair trial which includes the penalty stage of the proceedings. The fatal crack in that logic is that

the protection of a fair trial does not require the presumption of innocence at the penalty phase when a jury of twelve has just returned a unanimous verdict of guilt.

The case at bar presents a slightly different case from that in which the jury immediately considers the recommendation of penalty after the finding of guilt. The cause came to the Florida Supreme Court on direct appeal, and that court determined that a second penalty phase was required. Several years after the original hearing, the petitioner came before a second jury charged with the duty of recommending a sentence to the trial court. The distinction is not without relevance because in the penalty phase immediately following a guilt/innocence phase, respondent is not faced with the possibility that the defendant's previous behavior before the trial court did not suggest the need for restraint. In the instant cause, the lapse of time, coupled with information tending to demonstrate that petitioner was a security risk, allowed the judge in the exercise of his discretion to order the leg restraints.

Beyond the fact that the presumption of innocence no longer attached at the second penalty stage, this Court has recognized that an essential state policy can be legitimately furthered by the restraints.

> The trial court made the following statements:
>
> THE COURT: We will be in recess, gentlemen, for twenty minutes. I want to put something else on the record, too, before the jury gets in here.
>
> I received information from Chief Miro yesterday, the chief of detention for the. Broward County sheriff's office.
>
> He told me he received information from two of the lieutenants -- one in the jail, and one in the detective division -- that Mr. Elledge had become a karate expert, while in prison -- apparently; and he was going to attack my bailiff, either on the way to the courtroom or in the courtroom,

> today, because he had nothing to lose -- he is now serving two life sentences, plus fifty years for rape; and he is facing a death penalty, or another life sentence, arising out of this situation; that he has been adjudged guilty of these particular crimes.
>
> In an abundance of precaution, I entered an order to leave Mr. Elledge in leg irons here in these proceedings.

Clearly, the trial court acted reasonably in the exercise of its discretion. More to the issue at hand, the Supreme Court of Florida did not misapply this Court's ruling in Estelle v. Williams, supra. Petitioner has demonstrated no ground for the granting of a writ of certiorari.

> 2. Whether the Consideration of Mitigating Circumstances was Precluded by the Operation of Law.

Petitioner seeks to convince this court that the trial court felt bound to consider only the statutory mitigating circumstances. He does this by citing variously: 1) the sentencing took place pre-Lockett, 2) showing that the judge found no mitigating circumstances to be present even though petitioner submitted evidence as to mitigating circumstances, and 3) by alleging that the jury was instructed to consider only the statutory mitigating circumstances.

No conclusion that the judge felt bound to the enumerated mitigating circumstances can safely be drawn from the fact that the judge found no mitigating circumstances to exist. What the judge may have done in other cases cannot be utilized to show what his state of mind was in this instance.

Petitioner compares the instant case to Washington v. Watkins, 655 F.2d 1346 (5th Cir. 1981). That comparion fails. In Washington, the Fifth Circuit found that:

> Unquestionably, a reasonable juror might well infer from this parallel syntax that the enumerated factors -- both aggravating

> and mitigating -- were the sole factors that he was permitted to consider in the discharge of his oath.

Id. at 1370. Further, the Fifth Circuit stated:

> We first note that nowhere in the trial court's charge to the jury in the sentencing phase of Washington's trial is there any explicit instruction that the jury was free to consider mitigating factors other than Washington's age and lack of a significant history of prior criminal activity.

Id. at 1369. Unlike the situation presented by Washington, the jury here was instructed on the full panoply of mitigating circumstances. There was no language limiting the consideration of mitigation. The situation herein is closer to that presented in Spinkelink v. Wainwright, 578 F.2d 582 (5th Cir. 1978). The claim which was presented by Spinkelink is this:

> On the basis of language in Cooper v. State, 336 So.2d 1133, 1139 (Fla. 1976), Spinkelink contends that § 921.141 impermissibly limits the mitigating factors which the judge and jury can consider in assessing the death penalty, and therefore must be declared unconstitutional. We disagree.

Id. at 670.

The court disposed of the claim by citing Proffitt v. Florida, 428 U.S. 242 (1976). In Proffitt, this Court found that § 921.141, F.S., passed constitutional muster. Additionally, this Court stated that the statute contained no limiting language with respect to mitigating circumstances. In Lockett v. Ohio, 438 U.S. 586 (1978), this Court reaffirmed the constitutionality of the statute:

> Although the Florida statute approved in Proffitt contained a list of mitigating factors, six members of this Court assumed, in approving the statute, that the range of mitigating factors listed in the statute was not exclusive.

Id. at 606. * * * * *

> None of the statutes we sustained in Gregg and the companion cases clearly operated at that time to prevent the sentencer from considering any aspect of the defendant's character and record or any circumstances of his offense as an independently mitigating factor.

Id. at 607. This Court found that the Ohio statute was -- signifigantly different and therefore must fail. The instruction found in the trial court herein is not different from that found in Spinkelink.

> 3. Whether Double Jeopardy Attaches to Prevent Certain Aggravating Circumstances to be Found After, on Direct Appeal, the Previous Sentencing Proceedings are Found Infirm.

Petitioner urges this Court to grant certiorari on the ground that Bullington v. Missouri, ____U.S._____, 101 S.Ct. 1852 (1981), mandates that the double jeopardy protections prevent the use of an aggravating circumstance earlier found by the Florida Supreme Court to be unproven. The factual situation is this: the first sentence was based in part on the fact that petitioner had been charged with, and confessed to the murder of a security guard, one Gaffney. On direct appeal, the Florida Supreme Court found that the admission of petitioner's confession concerning the Gaffney murder was improper because petitioner had not been convicted of that murder. During the second penalty phase, evidence of the Gaffney conviction was introduced. Petitioner now claims that the attempt to demonstrate the aggravating factor of the Gaffney murder in the first trial bars, on double jeopardy grounds, the introduction of that crime at the second proceeding.

Bullington does not apply to this cause for two reasons. The first of these is that the statutes of Missouri and Florida are very different concerning the role of the jury in capital sentencing. The Florida statute approved by this court in Proffitt v. Florida, 428 U.S. 242 (1976), provides that

sentencing be done by the trial court after receiving the advisory sentence from the jury. The Missouri statute provides that if either the judge or the jury does not recommend the extreme penalty, then defendant is to be sentenced to life imprisonment. The net effect is that a recommendation of life from the jury is an absolute bar to the imposition of the death penalty by the judge in Missouri.

This Court has approved of the Florida sentencing structure which allows a judge to impose the death penalty after a jury has recommended life imprisonment. This Court stated in Proffitt:

> ...in Florida the sentence is determined by the trial judge rather than by the jury. This court has pointed out that jury sentencing in a capital case can perform an important societal function, (citations omitted), but it has never suggested that jury sentencing is constitutionally required. And it would appear that judicial sentencing should lead, if anything, to even greater consistency in the imposition at the trial court level of capital punishment, since a trial judge is more experienced in sentencing than a jury, and therefore is better able to impose sentences similar to those imposed in analogous cases.

Id. at 252.

In Bullington, this Court likens the presentencing hearing to a trial. The State of Missouri was required to prove certain facts beyond a reasonable doubt. The state of Missouri failed in that burden and the jury found that life imprisonment was warranted. This recommendation was binding on the trial judge and was a sentence rendered by the jury. This brings up the second distinction between Bullington and the case at bar--the fact that in Bullington, defendant was sentenced to life. In the instant case, the first sentencing proceeding resulted in a sentence of death for Elledge. No harsher sentence was received in the second proceeding herein.

It is the introduction of a portion of the state's proof that is the claimed double jeopardy infraction. But did the reversal of the sentence by the Florida Supreme Court on the ground that the proof was improperly presented, act as an acquittal of the sentence of death? It is preposterous to suggest that the answer to that question is affirmative. Instead, the Florida Supreme Court mandated a new sentencing proceeding, which allowed the state to present all proffered evidence relevant to proof of the aggravating circumstance. The next question is whether these elements of evidence of aggravating circumstances are tantamount to individual criminal charges. In Bullington, this Court succinctly states: "...the double jeopardy clause forbids retrial of a defendant who has been acquitted of the crime charged." Id. at 278. Clearly, the Florida Supreme Court was not finding that the state had failed to sufficiently prove a crime charged in determining that evidence of the Gaffney murder could not be utilized because it was outside the statutory mandates.

It is therefore clear that the petitioner has failed to demonstrate that Bullington has relevance to this case. The result further is that petitioner has failed to demonstrate that this Court should be grant certiorari on this issue.

4. Whether the Jury was Precluded from Hearing Evidence Concerning the Applicability of the Death Penalty.

Petitioner complains that he was prevented from adducing testimony at the penalty phase which was relevant to the nature and effect of the penalty of death.

In the portions of the transcript contained within petitioner's brief in support of the issuance of a writ of certiorari to the Supreme Court of Florida, petitioner has clearly shown that the evidence had no relation or relevance to

the crime charged or the character of the accused. As such, the testimony was irrelevant and the judge properly refused its admission.

In Lockett v. Ohio, 438 U.S. 506 (1978), this Court held:

> ...that the Eighth and Fourteenth Amendments require that the sentencer, in all but the rarest kind of capital case, not be precluded from considering as a mitigating facter, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for sentence less than death. [Emphasis in original.]

Id. at 604

It, therefore, appears that evidence not concerning defendant's character or any circumstance of the offense is outside that properly adduced for the purpose of mitigation.

In fact, petitioner sought to argue that the death penalty was improper, not that it was improper as applied to the instant cause. Clearly, the forum for that is a legislative one. The analogous situation would be the presentation of evidence that convicting a person for robbery does not tend to lower the incidence of robbery. The relevance is not even tenuous, it is simply nonexistent.

> 5. Whether the Rule Announced by the Florida Supreme Court in Elledge v. State, 346 So.2d 998 (Fla. 1977), Announces a "Automatic Harmless Error Rule"

In Elledge v. State, 346 So.2d 998 (Fla. 1977), the Supreme Court of Florida stated that had the trial judge found no mitigating circumstances, then even if there had been consideration of a nonstatutory aggravating circumstance, the existence of some statutory aggravating circumstance would allow his death sentence to stand. The logic he uses is this: the judge must weigh aggravating against any mitigating he may

find. If he specifically finds no mitigating circumstances, then as long as one proper aggravating circumstance exists, then the balance must always tip toward the death sentence. In Elledge, the trial court stated, "...insufficient mitigating circumstances exist to outweigh the aggravating circumstances...." Id. at 1003.

The Florida Supreme Court concluded in Elledge that the trial court implicitly found some mitigating circumstances to weigh against the aggravating, and as a result a new penalty phase was necessary. In Brown v. State, 381 So.2d 690 (Fla. 1980), the Florida Supreme Court stated:

> Although improper aggravating circumstances (factors enumerated one and two) went into the calculus of the trial judge's sentence decision and there was identified a mitigating circumstance (appellant's age), nevertheless Elledge v. State, 346 So.2d 998 (Fla. 1977), does not compel a reversal of the sentence judgment in this case. This is so because unlike Elledge, here "we can know" that the result of the weighing process would not have been different had the impermissible factors not been present. 346 So.2d, at 1003. The trial judge has told us in his order that appellant's age, twenty-two years at the time of the offense and twenty-three years at the time of the trial, had only "some minor significance." When this tenuous factor is juxtaposed against at least two well founded aggravating circumstances it is beyond reason to conclude that the trial judge's decision to impose the death penalty would have been affected by the elimination of the unauthorized aggravating circumstances.

Id. at 696.

Thus, the characterization of the Elledge precedent as an automatic harmless error rule is mistaken. In fact, if the Florida Supreme Court did not recognize the distinction between the cases with mitigating circumstances, and those without, the principles of Furman v. Georgia, 408 U.S. 238 (1972), would be violated. If life imprisonment can be imposed in a situation in which the trial court specifically found no mitigating

circumstances, but found an aggravating circumstance, then such a sentence would be open to the accusation that the sentencing was "wantonly" or "freakishly" imposed. Thus, a specific finding of no mitigating circumstances, along with a specific finding of a statutory aggravating circumstance, presumes that the death penalty is appropriate. This is the analysis made by the Florida Supreme Court. When no mitigating circumstance is weighed against any proper aggravating circumstance, obviously the death sentence is supported.

Petitioner claims that Zant v. Stephens, _____U.S. _____, 50 U.S.L.W. 4472 (May 3, 1982), presents the same issue herein. This is obviously not the case since in Stephens v. Zant, 631 F.2d 397 (5th Cir. 1980), it is clear that the trial court told the jurors that they could recommend life without enumerating the mitigating circumstances they found.

> The clear implication of the charge that the jury could recommend mercy without stating what mitigating or aggravating circumstances they found to be present is that aggravating circumstances could be present and yet the jury could still be free to impose life imprisonment.

Id. at 405. Thus, to recommend life, the jurors could have simply made the statement that aggravating circumstances did not outweigh mitigating. Clearly, one cannot know what the weighing process would have been without the improper aggravating circumstance in Stephens. That is diametrically opposed to the specific finding herein that no mitigating circumstances were present. Clearly, petitioner has not demonstrated that this Court should grant certiorari to review the decision of the Florida Supreme Court.

Recently, this Court found that Henry v. Wainwright, 661 F.2d 56 (5th Cir. 1981), should be remanded to the Eleventh Circuit for reconsideration in light of Engle v. Isaac,

U.S.___ (1982), 31 CrL 3001. The question of whether the appellate court could "know" the effect of the elimination of an aggravating circumstance from the juries' consideration was discussed. It seems that this Court has decided the issue against petitioner.

CONCLUSION

The petition for writ of certiorari should be denied.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have furnished a copy of the foregoing Brief for Respondent in Opposition to Mr. Craig S. Barnard, Chief Assistant Public Defender, 224 Datura Street, 13th Floor, West Palm Beach, Florida 33401, by U.S. Mail, this 25th day of June 1982.

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